Nursing home residents, injured patients take a beating in Azar

By MARK McGRATH

With not so much as a whimper, the N.C. Court of Appeals has completely rewritten the law of causation in medical malpractice and nursing home cases. In holding that a plaintiff must prove that a defendant's negligence is the proximate cause of a person's injury instead of a proximate cause of the injury, the Court of Appeals has made it virtually impossible to prove medical causation in nursing home cases.

The case is Azar v. Presybyterian Hospital, ____ N. C. App. ____, 663 S.E.2d 450 (2008).

TRADITIONAL NOTIONS OF PROXIMATE CAUSE

That there may be more than one proximate cause of an injury has been a well-accepted principle of the common law for centuries. A brief review of North Carolina case law reveals dozens of cases in which our courts have reaffirmed the principles that there may be more than one proximate cause of an injury and that a plaintiff never need prove that negligence is the sole cause of his injury. There are few better-accepted, black-letter principles in all of tort law.

In order to prevail on his claim, a plaintiff is required to prove by a preponderance of the evidence only that the defendant's negligence was a proximate case of his injuries. A plaintiff will prevail if negligence was the sole cause of his injury and he will recover if the negligence is merely one among many other causes. Put another way, it has long been held that a negligent actor will be held liable for an injury when his negligence plays a substantial and proximate part in causing the plaintiff's injury.

ENTER AZAR

Azar involved the death of an elderly woman, allegedly from complications arising from an untreated decubitus ulcer. The plaintiff's sole causation expert conceded in his deposition that the decedent suffered from multiple comorbities that combined in causing the decedent's death. When asked whether the decubitus ulcer was one of the causes of the decedent's death the expert replied, "there were [sic] at least one significant cause of the infections. There might have been others, there probably were. This is a very significant one."

This testimony clearly meets the standard required to prove proximate cause, namely that the untreated ulcer be at least one of the causes of the decedent's death. Until Azar, this testimony would have passed muster in any North Carolina courtroom.

The Court of Appeals held, however, that the testimony was "mere speculation" as to whether the bedsores "were the proximate cause of her death." (Emphasis added). The court went on to say that because the decedent suffered from "many ailments" and the expert could not say "whether one or more of the decedent's multiple complications was the ultimate cause of her death," his causation testimony was mere conjecture. (Emphasis added).

GROSS MISAPPLICATION OF THE LAW

The sad fact is, the reasoning applied by the Court of Appeals in Azar would flunk a first semester torts exam.

Plaintiffs are not required to prove that negligence is the proximate cause or the ultimate cause of their injuries. They are only required to prove that the defendant's negligence was a proximate cause of the injury. It's right there in the pattern jury instructions! In the context of the Azar case the plaintiff should only have been required to prove that the defendants negligently treated the ulcer and that the resultant infection was one of the causes of Ms. Azar's death.

In holding that a plaintiff must prove that negligence is the ultimate or sole proximate cause of a person's injuries, the Court of Appeals has effectively reversed two centuries of North Carolina common law.

IMPLICATIONS FOR NURSING HOME CASES

While the reasoning of Azar could be applied to any kind of negligence case, it is especially disastrous for those of us who represent victims of nursing home neglect. There is no such thing as a nursing home resident who does not have serious comorbidities. High blood pressure, diabetes, vascular disease, emphysema you name it.

The defendants in such cases will always argue that the comorbidity, not the negligence, killed the resident. Show me a case involving an untreated Stage IV pressure ulcer, and I'll show you a defense expert who will testify until she's blue that the resident died of a concurrent heart attack, not of sepsis. Give me a case of death involving a lethal methadone overdose, and the case will be lousy with defense experts claiming that the resident died of pneumonia or syphilis anything but methadone toxicity.

The challenge in nursing home cases has always been proving that the negligence of the defendant was a cause of the injury or death the proverbial straw that broke the camel's back, the physiological insult that pushed the already fragile resident beyond the point of healing. Almost by definition, nursing home cases don't involve healthy people. Folks don't move into nursing homes when they are hale and hearty.

Unless something is done about Azar, nursing home litigation will cease to exist except in those exceptionally rare cases involving actual abuse or negligence of the most obvious kind. It is a dangerous and indefensible opinion.

What is equally disturbing about Azar is that the testimony upon which the court based its ruling was not the product of grueling cross-examination. Far from it. Review of the entire deposition transcript demonstrates that defense counsel barely touched upon the issue of causation during his examination of the witness. The testimony cited by the court was elicited by plaintiff's counsel on direct examination by way of what might best be described as witness "clean-up."

PART OF A TREND?

We are treated with the arrival of Azar exactly one year after Kenyon v. Gehrig, another causation case that threw precedent to the wind and prescribed novel and draconian causation standards for medical negligence cases. One cannot help but notice that the Court of Appeals is making it increasingly difficult to get to a jury in medical malpractice cases. Whether they involve the striking of experts or the outright

dismissal of claims, the cases coming out of Raleigh are inflicting a serious beating on injured patients and nursing home residents.

And outside of those who choose to represent such folks, no one seems to care that our common law is being mangled in the process.